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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP ARTHUR THOMPSON, Defendant and Appellant.	C058768 (Super. Ct. No. P03CRF0593)

During the early morning hours of June 19, 1971, 22-year-old Betty C. was brutally murdered in an isolated area south of Highway 50 in El Dorado County. The matter eventually became a cold case when investigators could find no potential suspects and ran out of leads. In 2002, the investigation was reopened, and DNA from seminal fluids found on the victim's clothing was compared to an offender database. The comparison resulted in a match to defendant's DNA. Defendant was thereafter prosecuted and convicted of first degree murder.

He appeals, claiming a number of evidentiary and instructional errors regarding the use of evidence from two

sexual assaults allegedly committed by defendant around the time of the Betty C. murder. Defendant further contends the delay in prosecution amounted to a denial of due process, and various fines were improperly assessed. We conclude two fines must be stricken, but otherwise find no prejudicial error and affirm the judgment.

FACTS AND PROCEEDINGS

On the evening of June 18, 1971, Karen H., Robin L., and the victim went to a dance club in Sacramento. Karen and the victim were co-workers, and Robin and the victim lived in the same apartment complex in Sacramento. Later that evening Robin left the club with her boyfriend. Karen and the victim left the club around 1:00 a.m. on June 19 in Karen's car.

Karen stopped at a Texaco gas station on Madison Avenue near Interstate Highway 80 in order to use the restroom. The restroom was at the back of the station near a vending machine. When Karen pulled into the station, she saw a vehicle at the back of the station and a young man squatting near the vending machines. The man appeared to Karen to be young, of medium height and build, with dark hair. The vehicle was a white or off-white four-door with a hard top that appeared to Karen to be a 1963 Oldsmobile.

Karen went into the restroom and the victim remained in Karen's car. When Karen came out of the restroom, she saw the man just getting into his car. The man pulled out of the gas station and Karen followed him onto Madison Avenue and then onto

Highway 80 heading west. At one point, the man slowed his car and Karen began to pass him on the left. The victim rolled down her car window and spoke to the man. The victim then rolled the window back up and told Karen the guy was a "fox" and thought he was going to follow them.

When the two women arrived at the victim's apartment complex, the man pulled up behind them. The victim got out and told Karen she was going back to speak with him. As the victim walked back toward the man's car, Karen drove away.

At the time of this incident, the victim was living with her infant son and a roommate named Elizabeth F. The victim had left her son at Robin L.'s apartment with Robin's sister and Robin's two children. Elizabeth had remained at home.

The victim went into the apartment sometime between 1:00 and 2:00 a.m. At the time, Elizabeth was asleep on a couch in the living room. The victim told Elizabeth she was going to Lake Tahoe and needed a coat. The victim left the front door open and Elizabeth could see a man standing outside. He looked to be about 6'2" to 6'4" tall. She did not see his face. The victim grabbed the coat and left with the man. According to Elizabeth, she was the only person in the apartment when the victim arrived to get a coat.

The victim then went to Robin L.'s apartment to tell Robin she was going to Lake Tahoe. Robin saw a tall man with dark hair with the victim. The victim thereafter left with the man.

Stanley Ellis, who was living with his wife and children in the same apartment complex at the time, provided a different

scenario of what occurred that evening. Ellis testified he could not recall whether he had taken Betty and the others to the dance club that evening but recalled waiting in the victim's apartment for her to call him to come and pick them up. Also present in the apartment, according to Ellis, were Ellis's wife and the victim's roommate. Ellis testified he was present when the victim and the man arrived. According to Ellis, while the victim changed her clothes, the man stood outside. Ellis tried to engage the man in conversation and at one point even walked up to him to try and shake his hand. Ellis testified he felt uneasy about the guy and tried to talk the victim out of leaving with him. When the victim and the man eventually departed, Ellis looked out a back window of the apartment and saw them get into a dark blue Lincoln. Ellis testified he was only able to see the man's face in profile but was later able to pick defendant's photograph from a lineup.

The victim's body was discovered at approximately 1:00 p.m. the following afternoon in an isolated field approximately 15 to 20 miles west of Placerville along a dirt road south of Highway 50. She was lying on her back and was nude except for a bra. The victim had three gunshot wounds, one each to the head, chest and arm. She had also suffered such crushing blows to the head that she was unrecognizable. Items of the victim's clothing were discovered strewn about the area. There were stains on the victim's panties that were still moist. Officers found several .32 caliber shell casings, a .32 caliber bullet, and a set of

keys. A later examination revealed a milky fluid inside the victim's vagina. However, the fluid contained no sperm.

The investigating officers later received a telephone call from a woman who said her daughter, Elizabeth F., had a roommate who fit the description of the person found on June 19. The officers met with Elizabeth F., Robin M. and Karen H. The officers also visited the Texaco station where Karen said she had first seen the man suspected of the murder. The officers spoke with the attendants and examined credit card slips for gasoline purchases the evening of the murder. The officers made a list of the license plate numbers from the credit card slips. They later ran those numbers against Department of Motor Vehicle records to determine the registered owners. One of the credit card slips contained license plate number DUK323. However, the name on the slip was not legible. That number was registered to Thelma and Richard H. and was associated with a 1965 Oldsmobile convertible. Although it was not known at the time, Thelma and Richard H. were defendant's parents.

At some point, the investigation into the murder of Betty C. ran out of leads and ideas. The officers involved in the case never investigated defendant in connection with the murder.

Sometime later, defendant was convicted of unrelated criminal offenses, including solicitation to commit murder and being an accessory after the fact to murder, and a biological sample was obtained from him for DNA analysis and entry into the state convicted offender databank.

In July 2002, the Betty C. case was reopened and the bra and panties found at the murder scene were taken to the California Department of Justice crime lab for DNA analysis. Sperm cells were found on the panties, and the DNA from those cells was compared to the convicted offender database. A match was found to defendant. Officers were thereafter alerted, and they conducted further investigation, including obtaining a saliva sample from defendant. The DNA from that sample also matched the sample from the victim's panties.

Defendant is six feet, four and one-half inches tall.

At the time of the offense, defendant was married to Diana S. In 1971, defendant and Diana moved to a home on V Street in Sacramento, which was approximately six and one-half miles from the victim's apartment. Defendant and a partner, Mark M., operated a used car sales and service company located on Alhambra Boulevard, approximately five and one-half miles from the victim's residence. In 2003, investigating officers located and questioned Diana S., who recalled losing some keys in 1971. When the officers showed her the keys that had been found at the murder scene, her eyes got wide and she immediately grabbed the keys and started rubbing a stone attached to the keychain. Diana said the keychain looked familiar to her.

According to Diana S., she and defendant had been driving the Oldsmobile convertible with license plate number DUK323 in 1971. The car was a light colored, two-door convertible, with the convertible top the same color as the car body. During that period, defendant and Diana also owned and operated a Lincoln

that was off-white in color. Diana testified defendant owned guns in 1971 and often carried one in the car with him. However, she also testified she did not remember defendant having a Texaco credit card.

In addition to the foregoing, the prosecution presented evidence regarding two uncharged incidents in which it was alleged defendant sexually assaulted young women, the first involving Sharon S. on December 2, 1970, and the second involving Melinda M. on March 9, 1972. The details of those alleged assaults will be discussed in connection with defendant's contentions on appeal regarding admissibility of this evidence.

Defendant testified on his own behalf and denied murdering the victim. Although he could not recall where he had been on the evening of June 18, 1971, he testified he had not been to the Texaco station. Defendant acknowledged he and his wife ended up with the 1965 Oldsmobile convertible with license plate number DUK323, but claimed he did not like it because it was too big and his wife, father and brother drove it most of the time. He claimed he did not have either a Texaco or a government credit card, the only types of credit cards accepted by the Texaco station on Madison Avenue at the time. Defendant claimed he did not own a .32 caliber handgun in June 1971.

As to why his DNA may have been found on the victim's panties, defendant explained he had been at a party sometime before July 4, 1971, at the home of Ron W., and was sitting alone in the back yard when someone who looked like the victim

came on to him and they had sex in a tent. Defendant explained he had come to the party with a friend, Kimo, Kimo left in defendant's truck, and defendant was waiting for Kimo to return. When Kimo came back, defendant learned that Kimo had been in an accident and, because defendant was distracted by this incident, he never spoke to the woman again.

As to Stanley Ellis's testimony, defendant testified he and Ellis had been in jail together in 1972 and again in 1976. Defendant testified that in 1972 he was a jail trustee given the job of hospital orderly. Part of that job required him to go around the jail with a guard while the guard picked up mail from the inmates. Defendant would use a pill cart and pass out aspirin, band aids and other "minor" things. In doing so, he came in contact with Ellis. Defendant testified that, although he had seen Ellis on numerous occasions during the six to eight months defendant had the orderly job, Ellis had never accused defendant of being involved in the Betty C. murder.

On rebuttal, the prosecution presented the testimony of James H. (Kimo) who said he had been involved in an accident in defendant's truck on September 21, 1971, while he and John M. were driving the truck to the Bay Area to pick up another vehicle. James H. testified he did not remember going to a party with defendant at the home of Ron W. and never crashed any of defendant's vehicles other than this one time.

The prosecution also presented the testimony of William Roberts, who had worked in the Sacramento County jail during

1972. According to Roberts, trustee inmates never handed out medicine to other inmates.

Defendant was convicted of first degree murder. He was sentenced according to the law in existence in 1971 to an indeterminate term of seven years to life, to run consecutively to a life term defendant was already serving. The court imposed victim restitution in an amount and manner to be determined by probation or parole authorities. The court also imposed a restitution fine in the amount of $10,000 and a parole restitution fine of $10,000, with the latter stayed.

DISCUSSION

I

Evidence Code Sections 1101 and 352

For clarity, we take defendant's contentions slightly out of order.

Defendant contends the trial court erred in admitting evidence of the uncharged offenses allegedly committed against Sharon S. and Melinda M. That evidence consisted of the following.

On the evening of December 2, 1970, 16-year-old Sharon S. was visiting a friend at the friend's home in Sacramento. At approximately 7:30 p.m., Sharon went out to a store. On her way back at approximately 8:30 p.m., Sharon got lost. She encountered defendant and Mark Masterson, defendant's business partner, who asked her for directions to Sacramento State University. Sharon tried to give them directions but eventually

said that if they showed her how to get back to her friend's apartment, her friend could give them directions. Because Sharon was having trouble with the clutch on her car, defendant drove Sharon's car and Masterson followed.

They went to a gas station, where Masterson got gas. Then they drove down Folsom Boulevard and entered Highway 50 heading east. Defendant explained to Sharon he wanted to see a friend. They exited Highway 50 at Prairie City Road and stopped at the end of a road where there were no homes nearby. At this point, Sharon asked for her keys back so she could go home, but defendant refused, saying that is not what they came out there for. Defendant ordered Sharon to take off her clothes, but she refused. Defendant hit Sharon in the midriff and said if she did not comply he would throw her into the river. Sharon took off her clothes and they all climbed into Masterson's car, with Sharon in the back seat and the others in the front.

Defendant ordered Sharon onto the front seat, but she refused. Defendant began choking her. Sharon said she had never had sex before and defendant said he had never killed anyone before, but there was always a first time. Sharon got into the front seat, where defendant orally copulated her and then forced her to orally copulate him. Defendant then made Sharon get on top of him and he put his penis into her vagina. According to Sharon, defendant then got out of the car and Masterson came around and got in the passenger side with Sharon. Masterson forced Sharon to orally copulate him and then put his penis in her vagina.

Afterwards, Sharon got dressed and asked for her keys. Defendant directed her to look the other way and said he would drop the keys as they drove off.

Masterson testified at trial in the present matter and corroborated much of Sharon's version of what happened. Masterson admitted raping Sharon. He testified they had been riding around in a red Buick convertible when they happened upon Sharon. Defendant then drove Sharon's car while Masterson followed, until they reached Prairie City Road and stopped. Masterson testified defendant and Sharon got into Masterson's car, with Sharon in the back. Masterson further testified defendant pulled Sharon onto him and penetrated her vagina with his penis while Sharon cried. Defendant then directed Masterson to take his turn and he did so but could not achieve an erection. Masterson testified that afterward, he asked defendant if they could go but defendant said they could not because Sharon could identify them. Defendant said he was going to kill her. Instead, they threw Sharon's keys where she could not find them and left.

Defendant and Masterson were arrested the next day and charged with kidnap and sexual assault. A few days later, Masterson overheard defendant telling an employee, John M., to say that defendant and Masterson were with him at the shop late the night of the sexual assault. According to Masterson, this was not true.

Defendant and Masterson were tried jointly in the Sharon S. matter. John testified during the Sharon S. trial as he had been instructed by defendant.

In the present case, the defense presented the testimony of James C., who had been working for an employment agency in 1970 and 1971 and did business with defendant and Masterson. James had been a witness in the Sharon S. trial and indicated he had spoken to both defendant and Masterson at the shop on the evening of December 2, once around 7:45 p.m. and again at 9:30 p.m.

The transcript of the testimony of John M. from the Sharon S. trial was read to the jury. John had testified he worked at the shop from 7:00 p.m. to 10:00 p.m. on the night in question and Masterson was with him the entire time. According to John, defendant was there for most of the time but left with someone for 30 to 45 minutes.

Clifford C.'s testimony from the Sharon S. trial was also read to the jury. Clifford C. testified he saw defendant and Masterson at the shop on the evening in question both at 7:30 p.m. and again at 9:00 p.m.

The transcript of the testimony of Christine C. from the Sharon S. trial was also read. Christine testified she was a neighbor of defendant and saw him come out of his apartment at approximately 8:00 or 8:15 p.m. on the evening in question.

Defendant testified in the present matter that he and his wife had purchased a home the day of the alleged assault on Sharon S., and he had left his wife at the home at 7:00 p.m. and

returned to work. Defendant claimed he received several calls that evening from a man at an employment agency and, at around 8:00 p.m., had gone home to speak with his wife about the house. After half an hour, defendant returned to work. Later, a man came in to buy a convertible and, around 9:00 p.m., defendant took him for a test drive in a red Buick. Defendant claimed that the next morning the Buick was in a different spot on the lot than where he had left it.

Regarding Masterson's testimony about the Sharon S. incident, defendant testified Masterson was very forgetful and, on one occasion, when defendant and Masterson had witnessed a dog get hit near McKinley Park, defendant later heard Masterson recount the story as if he, Masterson, had hit the dog. Masterson became very emotional. Defendant also testified he did not know where Masterson was when defendant got back from the test drive in the red Buick. According to defendant, after the preliminary hearing in the Sharon S. case, Masterson said to him that he thought Sharon's testimony was funny and did not know what she was complaining about because he thought Sharon had enjoyed it. Defendant also testified that, during a break in the proceedings, while Sharon S. was in the hospital, Masterson had commented that Sharon was pregnant with his child and was in the hospital to get an abortion. Masterson told defendant he had been dating Sharon. Defendant denied ever trying to manipulate witnesses at the Sharon S. preliminary hearing and did not ask any witness to lie for him.

In the Sharon S. trial, a conditional examination had been taken of Freida D., the former wife of John M. The transcript of that testimony was read to the jury. Freida testified that, during the Sharon S. trial, Masterson had come to her and asked her to corroborate John's testimony that he had worked late at the shop the evening of the alleged sexual assault. At the time, Masterson also told Freida that Sharon had actually enjoyed the sex. When police officers came to her house to question her, Freida corroborated John's story as requested. However, according to Freida, John had actually gotten home by 6:00 p.m. that evening. Freida later informed police officers and the district attorney that she had not told the truth.

The parties stipulated that defendant and Masterson were acquitted in the Sharon S. case.

The second uncharged incident involved 17-year-old Melinda M. On March 9, 1972, Melinda was hitchhiking from her home in Colusa to Sacramento to attend a concert at the Memorial Auditorium. She was with a friend, John D. They were picked up by defendant and James Allen in Meridian. Allen was driving.

At some point during the ride, Melinda and John asked for an opportunity to use the restroom and Allen stopped the car on a levy road. Everyone got out of the car. When defendant, Allen and Melinda climbed back into the car, they drove off, leaving John D. behind.

Melinda began yelling and screaming and defendant put a gun to her head and told her to shut up and do as she was told. They drove into Sacramento and ended up at Allen's house

somewhere between W and X Streets. They pulled Melinda out of the car, hit and choked her, gagged her, and took her into the house. Later, both defendant and Allen raped Melinda.

Melinda begged the men to take her to the Memorial Auditorium and they eventually did so. However, when they arrived, Melinda was not permitted to enter the auditorium, so the three went to a restaurant and ate. After they left the restaurant, Melinda saw some friends and joined up with them, leaving defendant and Allen behind. Defendant and Allen left without further incident.

Regarding the Melinda M. matter, defendant testified he had met Allen in 1972 and had made a deal with Allen to sell him a freezer truck. When defendant pulled up to Allen's house with the truck, he walked over to Allen's car and saw two people get out of it, a white male and a female, followed by Allen. The woman was Melinda. The man and woman were arguing and walked up to the house. Defendant asked Allen for the money, and Allen said he was a little short and would have to go get some of it. Allen departed and, as defendant waited outside the front door of the house, the man came out, pushed a replica, plastic gun into defendant's hands and told defendant to watch the woman. Defendant threw the gun onto a chair. At some point, Melinda asked defendant his name. Eventually, Allen returned, gave defendant his money, and defendant departed.

However, defendant acknowledged that when first questioned by police about the Melinda M. matter in connection with the instant case, defendant told the officer that when he went to

Allen's house he had seen the two people, Melinda and the man, breaking into Allen's car. The officer testified defendant told him he had held the two people at gunpoint with a .45 caliber handgun he later gave to Allen.

Defendant eventually entered a negotiated plea of guilty to assault in connection with the Melinda M. case.

The trial court admitted the foregoing evidence over defendant's Evidence Code sections 1101 and 352 objections "for the purpose of showing a common design or plan and motive." Defendant contends this was error, because there were insufficient similarities between the charged and uncharged offenses to justify admission for the purpose of showing a common plan or scheme. He further argues there was no issue of intent or motive to justify admission of the evidence on that basis and, in any event, the evidence was not probative of intent or motive because, again, the charged and uncharged offenses were too dissimilar. Finally, defendant argues admission of the evidence violated his federal due process rights.

The People contend defendant has forfeited his due process argument by failing to raise it below. "[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Rogers* (1978) 21 Cal.3d 542, 548.) "The objection requirement is necessary in criminal cases because a 'contrary rule would deprive the People of the opportunity to cure the defect at

trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal."' [Citation.] 'The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.' [Citation.]" (*People v. Partida* (2005) 37 Cal.4th 428, 434 (*Partida*).)

A limited exception to the objection requirement has been recognized where the new ground raised on appeal is in fact premised on the same general argument raised in the trial court. In *Partida*, *supra*, 37 Cal.4th 428, the defendant objected to the introduction of evidence on the basis of Evidence Code section 352 and, on appeal, raised a due process argument. (*Id.* at pp. 432, 433.) The high court concluded such claim is not forfeited to the extent it is limited to an argument that the court abused its discretion in overruling the Evidence Code section 352 objection and such abuse amounted to a denial of due process. (*Id.* at p. 435.) As the court explained, "'no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also

determine the claim raised on appeal.'" (*Id.* at p. 436, quoting from *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

However, a defendant who objected to evidence solely on the basis of Evidence Code section 352 may not thereafter raise on appeal a different due process argument. (*Partida*, *supra*, 37 Cal.4th at pp. 435, 438.) In other words, while such defendant may argue on appeal that because the evidence was more prejudicial than probative its introduction violated due process, he may not argue introduction of the evidence violated due process for some other reason. (*Id.* at p. 435.)

Here, defendant argues admission of the evidence over his Evidence Code sections 1101 and 352 objections amounted to a denial of due process. He may make such an argument. (*People v. Huggins* (2006) 38 Cal.4th 175, 199-200.) However, defendant's argument in this regard goes no further than asserting, consistent with Evidence Code sections 1101 and 352, that admission of the evidence was an abuse of discretion because the prejudicial effect of the evidence outweighed its probative value. As such, the argument may be raised on appeal, but really adds nothing to the legal analysis. Resolution of defendant's due process argument turns on the success of his Evidence Code arguments, to which we now turn.

Evidence Code section 1101, subdivision (a), prohibits the admission of character evidence, including evidence of specific instances of uncharged offenses, to prove the conduct of a person on a particular occasion. Notwithstanding this prohibition, evidence of uncharged offenses may be admitted when

relevant to prove some fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or consent. (Evid. Code, § 1101, subd. (b).) The admissibility of evidence of uncharged offenses under this section depends upon the fact sought to be proved and the degree of similarity between charged and uncharged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 (*Ewoldt*).) Greater similarity is needed to prove a common design or plan than to prove intent, whereas the greatest degree of similarity is needed to prove identity. (*Id.* at pp. 402-403.)

The trial court here found the evidence admissible both on a common plan or scheme and on motive. The People argue both conclusions are correct. As to motive, the People argue that, after failing to kill Sharon S. and then having her testify against him, defendant was not about to make that mistake again. However, where the identity of the perpetrator is not known, the issue of motive really just goes to the issue of identity. In other words, evidence regarding who might have had a motive to kill the victim is relevant to prove the identity of who actually did so. For example, evidence that a defendant had killed a former wife in order to collect insurance proceeds would be relevant to prove it was the defendant who killed his most recent wife. However, where it is suggested the defendant had a motive to silence the only witness to the crime, that motive could equally be shared by all potential perpetrators. Although defendant might have had a greater motive than most,

because he had already been burned once, this enhanced motive hardly singles him out as the perpetrator.

As for a common plan or scheme, the prosecution presented no evidence and no argument that defendant had a particular plan or scheme to victimize young women. As explained in *Ewoldt*, "in establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts . . . ." (*Id.* at p. 403.)

Here, the commonalities between the charged and uncharged offenses were not being used to prove defendant had a common plan or scheme but to prove the identity of the perpetrator. In other words, because the uncharged offenses were committed by defendant and shared similar characteristics to the charged offense, defendant must be the person who committed the charged offense as well.

"The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and

characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

In the present matter, there are a number of similarities between the charged and uncharged offenses. In all three, the victims were young Caucasian females who appear to have been chosen by chance encounter. All three offenses occurred during the same general timeframe between the later part of 1970 and early 1972. In each case, the victim had been told she would be taken to a particular location only to be taken instead to a location where she could be rendered helpless. In all three cases, defendant committed acts of violence against the victims. Finally, all three cases involved sexual intercourse between defendant and the victim, although in the charged offense the prosecution did not pursue a theory of forced sex.

There were, however, dissimilarities as well. In the two uncharged offenses, defendant worked in tandem with another, whereas in the charged offense there is no evidence of another perpetrator. Also, only in the instant case was the victim killed. In fact, as noted above, the prosecution pursued this case on the theory that the murder was the only crime committed.

However, we need not decide in the instant case whether the trial court violated Evidence Code section 1101 in admitting the uncharged offense evidence. As we shall explain, any error in admitting the evidence was harmless in light of the overwhelming evidence against defendant.

The most damning of this evidence was, of course, the presence of semen containing defendant's DNA on the victim's panties. Although defendant attempted to downplay the DNA evidence as somehow tainted by the passage of time and the mishandling of the physical evidence, he ultimately embraced the evidence and attempted to explain it away. However, he did so by way of a story that was both incredible in the abstract and contradicted by all other evidence presented. Defendant explained that sometime before the Fourth of July in 1971, he went to a party at the home of Ron W. with his friend Kimo in defendant's Ranchero. According to defendant, Kimo left defendant at the party and, while driving the Ranchero, got into an accident. Meanwhile, defendant was hanging out in Ron W.'s backyard when some women came by and spoke with him. A little later, one of the women, whom defendant identified by her picture as the victim, practically threw herself on him and they had sex in a tent. Afterward, the victim walked away without another word and, when Kimo returned to tell defendant about the accident, defendant left with him and never saw the victim again.

Defendant's theory was that this encounter occurred sometime before June 18 and resulted in his semen being deposited on the victim's panties. Then, so the theory goes, on June 18, the victim was still wearing the panties, unwashed, when she was murdered by someone else.

Besides the inherent incredibility in defendant's story that he and the victim had never met before they had sex

together in a tent in Ron W.'s back yard, and afterward parted ways without speaking to each other, defendant's theory is contradicted by the testimony of the victim's roommate, who said the victim always wore clean clothing. It is also contradicted by the testimony of Kimo, who indicated he did not remember going to a party with defendant at the home of Ron W., did not remember anyone named Ron W., and had only wrecked one of defendant's vehicles, and this occurred on September 21, 1971. Finally, there was the evidence of the officer who collected the evidence at the crime scene that the semen stain on the panties was still moist.

There was, of course, much more evidence tying defendant to the crime. Most of the eyewitnesses identified the man with the victim that night as a tall man. Defendant is six feet, four and one-half inches tall. There was also the set of keys found at the scene, which were shown to Diana S., defendant's ex-wife, who appeared to recognize them as the keys she had lost in 1971. According to Diana, when she asked defendant in 1971 about the lost keys, he became extremely angry and overreacted.

There was also the 1965 off-white, 2-door Oldsmobile convertible with license number DUK323 that had been at the Texaco station on the evening the man was first seen by the victim and Karen H. Defendant's wife testified she and defendant were driving that car in 1971. Although Karen H. described the car she had seen as a four-door hardtop, it must be remembered this was late at night. These discrepancies do not negate her testimony. Nor does the fact she described the

man as five feet, ten or eleven inches tall. Karen testified she never saw the man standing up.

There is also the eyewitness identification of defendant by Stanley Ellis. Although Ellis was certainly not the most credible witness, and his testimony contradicted in parts that of the other eyewitnesses, the jury was free to accept his testimony, especially in light of the defense's attempt to trick Ellis by showing him a photograph of someone other than defendant but with defendant's name on the photograph. Although defendant testified Ellis knew him because they had been in jail together and defendant had been given the job of passing out minor medicines to inmates, including Ellis, much of defendant's testimony in this regard was impeached by William Roberts, a guard at the jail when defendant and Ellis were there together, who testified no inmate ever passed out medicines to other inmates.

Finally, there were other instances of defendant lying that served to destroy his credibility and thereby left the prosecution's case virtually unchallenged. In an attempt to explain why he carried handguns with him on occasion, defendant testified he had a second job in late 1970 and early 1971, unknown to his wife, in which he worked for Art Cowan, the chief of staff for a state senator, whereby he ran errands and drove Cowan around. Defendant also claimed he worked for Allen May, Richard Nixon's campaign manager in California, as a courier. Defendant testified that, because of these jobs, he had obtained

a concealed weapon permit and owned a Colt 357 and a Ruger Blackhawk 357.

The foregoing testimony was refuted by that of Yvonne Wright of the Department of Justice, who indicated she checked the official records going back to 1965 and there is no record of defendant submitting an application for a concealed weapon permit.

Defendant denied ever saying to Frieda D. that he would not lie for just anyone but would lie for her husband, John M. However, Frieda testified defendant told her "he was perjuring himself for John and he didn't do that for just anybody."

The jury also learned that defendant has a long criminal record, including a 1972 forgery conviction, a 1975 conviction for receiving stolen property, 1976 convictions for solicitation to commit murder and being an accessory after the fact to murder, a 1976 conviction for solicitation to commit perjury, a 1979 conviction for criminal possession of a firearm, 1982 convictions for robbery and kidnapping to commit robbery, and a 1994 conviction for possession for sale of marijuana. In addition, defendant admitted having lied to the police in the past. All these convictions reflect that defendant is a dishonest person.

Normally, a verdict will not be set aside for the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (Evid. Code, § 353.) A miscarriage of justice has occurred when there is a reasonable probability a different verdict would have resulted had the evidence not been admitted.

(*People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Watson* (1956) 46 Cal.2d 818, 835.)

However, in the present matter, as explained above, defendant has asserted a federal due process argument. In effect, he claims admission of the evidence denied him a fair trial under the United States Constitution. Federal constitutional error is governed by the Chapman standard and requires that we find the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].)

We do so here. As described above, in the absence of the evidence regarding the uncharged offenses, the evidence arrayed against defendant was overwhelming. Defendant asserts the jury was uncertain of his guilt, as evidenced by the six and one-half hours of deliberations. However, the length of deliberations, which also included time for a re-read of some of the testimony, was not that long given the large amount of evidence and the numerous exhibits presented in the case.

Defendant considers the DNA evidence "a fairly thin reed on which to stake the issue of identity," which really was the only issue in the case. We disagree. There was nothing in the case to contradict this evidence except defendant's convoluted and incredible explanation for how his DNA got on the victim's clothing. The statistical evidence presented to the jury, and the other evidence tying defendant to the crime, dispelled any possibility of a random match error. The only question for the jury was whether the DNA got on the victim's panties in the

course of defendant committing the crime or, as defendant suggests, sometime earlier, when the victim had random sex with the defendant and then failed to change or wash her underwear over however many days intervened between the party at Ron W.'s house and the day the victim and her friends went to the dance club. This question fairly answers itself. We conclude any error in admitting the uncharged offense evidence was harmless beyond a reasonable doubt.

II

Confrontation Clause

At the time of trial in this matter, Sharon S. was no longer alive and, because defendant had been acquitted of kidnapping and raping her, there was no transcript of the trial in that case. However, Sharon's preliminary hearing testimony was available, and the prosecution moved in limine to admit that transcript into evidence. Defendant objected on the basis of the confrontation clause, arguing the defense had not been given an adequate opportunity to cross-examine Sharon at the preliminary hearing. The trial court granted the prosecution's motion, and the testimony was read to the jury.

Defendant contends the trial court violated his confrontation clause rights. He argues, as he did below, he did not have an adequate opportunity to cross-examine Sharon at the preliminary hearing. In particular, according to defendant, the magistrate precluded him from cross-examining Sharon about "activities between the time she left the scene of the alleged

offenses and her return to her friend's home *four hours later*." Defendant further points out the court in the earlier trial had granted a Penal Code section 995 motion and ordered a new preliminary hearing to cure the error, thereby "underscor[ing] the fact that it was error to admit the deficient preliminary hearing transcript against appellant during trial."

"A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This right, however, is not absolute." (*People v. Wilson* (2005) 36 Cal.4th 309, 340.) In *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*), the United States Supreme Court held the confrontation clause prohibits the admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68 [158 L.Ed.2d at p. 203].) Although the high court did not define the term "testimonial," it did give examples, including preliminary hearing testimony. (*Ibid.*)

Under *Crawford*, the requirement that the defendant had an opportunity for cross-examination is satisfied if the defendant "had the opportunity to cross-examine the witness at [the] hearing with an interest and motive similar to that which defendant has at the hearing at which the testimony is admitted." (*People v. Valencia* (2008) 43 Cal.4th 268, 292.) Consistent with *Crawford*, "Evidence Code section 1291, subdivision (a)(2), provides that former testimony is not rendered inadmissible as hearsay if the declarant is

'unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.'" (*People v. Wilson*, *supra*, 36 Cal.4th at p. 341.) Under Evidence Code section 1291, as long as the defendant was given an ample opportunity for cross-examination, admissibility of the evidence does not turn on whether the defendant availed himself of that opportunity. (*Wilson,* at p. 346.)

California law and federal law are identical with respect to confrontation clause requirements. (*People v. Valencia*, *supra*, 43 Cal.4th at pp. 291-292.)

Defendant does not contest the unavailability of Sharon S. Nor does he contend he did not have a similar motive for cross-examination at the time of the preliminary hearing in the earlier case. Defendant claims instead that he was not given an adequate opportunity for cross-examination because of the magistrate's evidentiary rulings. In particular, defendant argues he was not permitted to cross-examine Sharon about her activities between the time she left the scene of the alleged offenses and her return to her friend's home. Defendant contends "[c]urtaining [*sic*] and excluding impeachment directly relevant to the credibility determination violates the Confrontation Clause," citing as support two out-of-state decisions, *State v. Stuart* (2005) 279 Wis.2d 659 [695 N.W.2d

259] (*Stuart*) and *People v. Fry* (Colo. 2004) 92 P.3d 970 (*Fry*). However, those cases are inapposite.

In *Stuart*, the court explained that under Wisconsin law, a defendant is precluded altogether from cross-examining a witness on the issue of credibility at a preliminary hearing. (*Stuart*, *supra*, 279 Wis.2d at p. 673.) Likewise, under Colorado law, as applied in *Frye*, a preliminary hearing is limited to a determination of probable cause and, absent circumstances where credibility is an issue of law, a defendant may not cross-examine a witness on credibility at a preliminary hearing. (*Fry*, *supra*, 92 P.3d at p. 977.) In *Fry*, the court in fact distinguished California law, where the preliminary hearing is more a mini-trial than a probable cause determination. (*Ibid.*)

In *People v. Valencia*, *supra*, 43 Cal.4th 268, the prosecution presented evidence in the penalty phase of the defendant's capital case that, in 1991, the defendant and another, while armed, had forced Hernan Sanchez to drive his truck to a nearby house where they robbed him. Over defense objection, the trial court permitted the prosecution to present the preliminary hearing testimony of Sanchez from that earlier prosecution. (*Id.* at p. 291.) The defendant argued on appeal he had not been given an adequate opportunity for cross-examination because, at the preliminary hearing, the court had sustained a few relevance objections to defense cross-examination of Sanchez about his conduct after the robbery, in particular when and under what circumstances he had reported the crime. (*Id.* at p. 294.) After reviewing the preliminary

hearing transcript, the trial court found the defendant had received an adequate opportunity for cross-examination and admitted the evidence. The Supreme Court agreed the "minor" evidentiary rulings did not render the evidence inadmissible. (*Ibid.*)

In the present matter, the magistrate in the Sharon S. case precluded defendant from cross-examining Sharon about what she did after she was released by defendant and Masterson. The prosecution had argued this was beyond the scope of direct examination. There is no indication the magistrate otherwise precluded defendant from impeaching Sharon in general or in connection with the matters to which she did testify. We agree with the trial court this minor curtailment of cross-examination did not violate defendant's confrontation clause rights.

Defendant argues the trial court in the Sharon S. matter granted a Penal Code section 995 motion and ordered a new preliminary hearing "to cure this error." Defendant does not explain what he means by "this error," but infers it was the curtailment of cross-examination. However, defendant cites as the sole support for this assertion his own memorandum in opposition to the People's motion in limine, where defendant asserted, without any citation to the record: "The [p]reliminary [h]earing judge's limitation on cross-examination of Ms. [S.] was in fact the subject of a 995 [m]otion filed by [d]efendant. On March 9, 1971, [d]efendant's 995 [m]otion was granted . . . ."

"It has long been settled that the burden is on an appellant to affirmatively show in the record that error was committed by the trial court: '[I]t is settled that: "A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (3 Witkin, Cal. Procedure (1954) Appeal, § 79, pp. 2238-2239; [citations].)' (*Denham* v. *Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65, 468 P.2d 193].)" (*People* v. *Alvarez* (1996) 49 Cal.App.4th 679, 694, fn. omitted.)

At any rate, the fact the trial court in the Sharon S. matter may have thought defendant had not been given an adequate opportunity to cross-examine Sharon does not mean defendant's confrontation clause rights were violated in this case. As we have explained, the trial court here did not err in concluding defendant's rights were not violated by admission of the preliminary hearing transcript.

III

Due Process and Double Jeopardy

Defendant contends the trial court erred in admitting any evidence of the alleged kidnap and rape of Sharon S. He argues the use of such evidence, where he was ultimately acquitted of the charges, violates due process and double jeopardy

principles. Defendant acknowledges both the United States and California Supreme Courts have already rejected this argument. (See *Dowling v. United States* (1990) 493 U.S. 342, 350, 353-354 [107 L.Ed.2d 708, 718, 721]; *People v. Steele* (2002) 27 Cal.4th 1230, 1245, fn. 2.) However, he argues that more recent United States Supreme Court precedent has imposed greater restrictions on the use of prior testimony.

The People contend defendant failed to object to introduction of the evidence on due process and double jeopardy grounds and therefore has forfeited those arguments for purposes of appeal. We agree.

As noted earlier, the prosecution moved in limine to admit evidence of the prior alleged kidnap and rape of Sharon S. Defendant submitted opposition arguing the evidence was inadmissible under Evidence Code sections 1101 and 352. At no time did defendant raise a double jeopardy or due process argument.

As explained earlier, questions of admissibility of evidence will not be reviewed on appeal absent a specific and timely objection on the same ground urged on appeal. (*People v. Rogers*, *supra*, 21 Cal.3d at p. 548.) A limited exception to this objection requirement has been recognized where the new ground raised on appeal is in fact premised on the same general arguments raised in the trial court. (*Partida*, *supra*, 37 Cal.4th at pp. 432, 433.)

Here, defendant argues on appeal that introduction of evidence regarding the Sharon S. assault violated due process

because he was acquitted of those charges. This is a new argument distinct from the Evidence Code sections 1101 and 352 objections raised in the trial court. It has therefore been forfeited.

Defendant argues we may nevertheless consider the argument in our discretion because it "involves a substantial federal constitutional right, the guarantee of public trial." However, not every evidentiary ruling amounts to a denial of the right to a public trial. Defendant fails to explain how the challenged evidentiary ruling here did so.

Defendant further argues that, to the extent trial counsel's failure to object forfeited the issue on appeal, he received ineffective assistance of counsel. However, as we recently explained in *People v. Mitchell* (2008) 164 Cal.App.4th 442, a claim of ineffective assistance "has increasingly become the favored means by which appellate defense counsel attempt to avoid any and all claims of forfeiture. In effect, if an issue is forfeited, then counsel's representation must have been deficient, and the issue must be considered anyway to determine if the ineffective assistance resulted in prejudice. However, that is not the applicable standard.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692, 104 S.Ct. 2052]; *People v. Pope* (1979) 23 Cal.3d 412, 422 [152 Cal.Rptr. 732, 590 P.2d

859].) This right 'entitles the defendant not to some bare assistance but rather to *effective* assistance.' (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839].) '"[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof."' (*In re Avena* (1996) 12 Cal.4th 694, 721 [49 Cal.Rptr.2d 413, 909 P.2d 1017].)

"'[T]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel.' (*People v. Boyette* (2002) 29 Cal.4th 381, 433 [127 Cal.Rptr.2d 544, 58 P.3d 391].) If, as here, the record fails to show why counsel failed to object, the claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation. (*People v. Huggins* (2006) 38 Cal.4th 175, 206 [41 Cal.Rptr.3d 593, 131 P.3d 995].) 'A reviewing court will not second-guess trial counsel's reasonable tactical decisions.' (*People v. Kelly* (1992) 1 Cal.4th 495, 520 [3 Cal.Rptr.2d 677, 822 P.2d 385].)" (*People v. Mitchell*, *supra*, 164 Cal.App.4th at pp. 466-467.)

In the present matter, defendant's ineffective assistance argument consists of the following: "[T]here can be no plausible rational tactical purpose for trial counsel not to

preserve this substantial state statutory and federal constitutional issue" and, therefore, "[a]ny deficiency in trial counsel's objections must be deemed the result of incompetence, not the result of a reasonable tactical decision."

This argument does not even attempt to explain how counsel's failure to object fell below an objective standard of reasonableness. Effective assistance is not perfect assistance. Defendant asserts there can be no tactical basis for counsel's actions but fails to explain how this is so. "[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People* v. *Frierson* (1991) 53 Cal.3d 730, 749.)

Nor does defendant attempt to explain how he was prejudiced by counsel's failure to object. "In determining whether an attorney's conduct so affected the reliability of the trial as to undermine confidence that it 'produced a just result' [citation], we consider whether 'but for' counsel's purportedly deficient performance 'there is a reasonable probability the result of the proceeding would have been different.' [Citations.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 263.) Here, there was no such reasonable probability. As explained earlier, this was not a close case. Exclusion of the Sharon S. evidence would not have changed the outcome. Defendant's argument merely presumes counsel's failure to object fell below

an objective standard of reasonableness and he was prejudiced thereby. This will not suffice.

IV

CALCRIM No. 375

In connection with the uncharged offense evidence, the jury was instructed pursuant to CALCRIM No. 375 as follows:

"The People presented evidence that the defendant committed other offenses that were not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true."

Defendant contends it was error to instruct the jury it may apply a preponderance of the evidence standard to evidence of uncharged offenses. He argues this standard "unconstitutionally reduced the prosecution's burden and violated Due Process." Defendant further argues the instruction conflicted with other instructions subjecting all other circumstantial evidence to a proof beyond a reasonable doubt standard.

Defendant acknowledges a similar argument was rejected by the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*). He asserts the issue is raised here

both to seek reconsideration in state court and to preserve the issue for purposes of federal review.

As defendant of course recognizes, this court is bound by California Supreme Court precedent (*Auto Equities Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and therefore is in no position to reconsider *Reliford*. Furthermore, defendant ignores the remaining portion of the instruction, which provides sufficient clarification that the People remain obligated to prove each element of the charged offense beyond a reasonable doubt. The rest of the instruction read:

"If the People have not met this burden [of proving the uncharged offenses by a preponderance of the evidence], you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged offenses, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not:

"The defendant acted with the intent to commit murder; or

"The defendant had a motive to commit the offense alleged in this case; or

"The defendant had a plan or scheme to commit the offense alleged in this case.

"In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense.

"Do not consider this evidence for any other purpose except for the limited purpose of the defendant's intent, motive or plan or scheme.

"Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

"If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder. The People must still prove each element of the charge beyond a reasonable doubt."

Since *Reliford*, this court has repeatedly upheld a similar instruction, CALCRIM No. 852, which addresses evidence of prior, uncharged acts of domestic violence. (See *People v. Johnson* (2008) 164 Cal.App.4th 731, 738-740; *People v. Reyes* (2008) 160 Cal.App.4th 246, 250-253.) Referring to the predecessor to CALCRIM No. 852, CALJIC No. 2.50.02, which had been found constitutional in *People v. Pescador* (2004) 119 Cal.App.4th 252, we explained: "CALCRIM No. 852 makes clear the evidence of uncharged acts of domestic violence may only be considered at all if it has been established by a preponderance of the evidence and explains what is meant by that burden of proof. The instruction also explains that if that burden is not met, the evidence must be disregarded entirely.

"As with CALJIC No. 2.50.02, CALCRIM No. 852 explains that *if* the jury finds the defendant committed the uncharged acts, it *may* but is not required to conclude the defendant was disposed to or inclined to commit domestic violence and may also conclude that the defendant was likely to commit and did commit the crimes charged in the case. Also as with CALJIC No. 2.50.02,

CALCRIM No. 852 clarifies that even if the jury concludes the defendant committed the uncharged acts, that evidence is only one factor to consider, along with all other evidence and specifies that such evidence alone is insufficient to prove the defendant's guilt on the charged offenses. CALCRIM No. 852 then goes on to state that the People must still prove each element of every charge beyond a reasonable doubt. In this, CALCRIM No. 852 goes further than CALJIC No. 2.50.02 with a clarification which inures to the defendant's benefit." (*People v. Reyes*, *supra*, 160 Cal.App.4th at p. 252.)

Nothing in CALCRIM No. 375 authorizes the jury to use a preponderance of the evidence standard for other than the preliminary question of whether defendant committed the uncharged offenses. Viewing the instruction as a whole, it is not reasonably likely the jury would have interpreted the instruction to authorize conviction on the charged offense based on a lower standard than proof beyond a reasonable doubt.

V

License Plate Number DUK323

Prior to trial, the parties submitted briefs on whether the prosecution would be permitted to present evidence that, in 1971, officers investigating the Betty C. murder read license plate number DUK323 from a credit card slip at the Texaco gas station on Madison Avenue and thereafter traced the number to defendant. The People argued the license plate number was not hearsay because the notation "DUK323" was not being offered to

prove the truth of anything. Defendant argued in response that the evidence was hearsay, because it was being offered to prove the truth of the matter asserted, i.e., that the license plate, and the car bearing it, were in fact present at the gas station on the date in question. At the hearing on the issue, defendant also argued the evidence did not qualify as a business record. The trial court overruled defendant's objections, finding the evidence was not hearsay, and admitted it in evidence.

Defendant contends his due process and confrontation clause rights were violated by admission of the license plate evidence. He argues, as he did below, the evidence was hearsay and was not admissible under the business records exception to the hearsay rule.

The People argue the evidence was not hearsay. They cite Evidence Code section 1200, which defines hearsay evidence as a "statement" made by someone other than a witness at trial offered to prove the truth of the matter asserted, and Evidence Code section 225, which defines "statement" as either an "oral or written verbal expression" or "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." The People argue the license plate number written on the credit card slip was not a "statement" within the meaning of the foregoing provisions but "non-assertive conduct." According to the People, the license plate number falls within the "'"well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether

these things were true or false . . . .”’” (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1069 (*Fields*).) The People further argue “the license plate number was circumstantial evidence of [defendant’s] presence at the gas station on the night of [Betty C.’s] murder.”

The People’s argument is internally inconsistent. In order for the license plate number written on the credit card slip to be circumstantial evidence of defendant’s presence at the gas station that evening, it is necessary that the credit card slip accurately reflect the license plate number of the car that was at the gas station. In other words, the license plate number written on the credit card slip is being offered for the truth of the matter asserted, that is, that a license plate number on a car that charged gasoline on the night in question was “DUK323.”

In support of their assertion the license plate number is not hearsay, the People cite *People v. Harvey* (1991) 233 Cal.App.3d 1206 (*Harvey*) and *Fields*, *supra*, 61 Cal.App.4th 1063. In *Harvey*, the defendants were convicted of conspiracy to sell or transport cocaine, conspiracy to possess cocaine for sale, and possession for sale of cocaine. (*Harvey*, *supra*, at p. 1209.) On appeal, the defendants argued the trial court erred in admitting into evidence pay-owe ledgers which, they asserted, were inadmissible hearsay. (*Id.* at pp. 1219-1220.) However, the trial court, sitting without a jury, had indicated the evidence was not being admitted for the truth of the matters

asserted but as circumstantial evidence of cocaine sales and a conspiracy. (*Id.* at p. 1220.)

The Court of Appeal found no hearsay violation, explaining: "[T]he critical inquiry is whether the testimony was *received* to show these transactions actually occurred as stated. If the testimony was received to prove these transactions occurred in the manner stated, it was hearsay. However, if the testimony was received, as the court indicated, as circumstantial evidence of sales of cocaine or a conspiracy to sell or distribute cocaine, it was not hearsay." (*Harvey, supra,* 233 Cal.App.3d at p. 1220.) Because, in this instance, the evidence was admitted for a non-hearsay purpose, there was no error. (*Id.* at pp. 1222-1223.)

Harvey is inapposite. There, the truth of what was stated on the pay-owe sheets was immaterial. The evidence was admitted to show only that the documents were pay-owe sheets, in order to prove circumstantially that drug sales were taking place. The evidence was not admitted to prove the truth of any particular transaction recorded on the documents. Here, by contrast, the truth of what was stated on the credit card slip was at issue. The notation on the credit card slip was not being admitted just to show the credit card slip was, in fact, a credit card slip. It was being admitted to show the number recorded on the credit card slip was the license plate number of the vehicle that was present at the gas station that evening.

In *Fields*, the defendant was convicted of selling cocaine and, at trial, the court admitted evidence that, at the time of

the defendant's arrest, he was found in possession of a pager. The pager contained a telephone number corresponding with the number of a phone booth from which an informant had placed a call to set up a cocaine purchase shortly before the defendant's arrest. (*Fields*, *supra*, 61 Cal.App.4th at pp. 1066-1067.) The Court of Appeal concluded the evidence was not hearsay. (*Id.* at pp. 1067-1068.) According to the court, "[t]he fact his pager contained the number for the telephone in the parking lot adjacent to the gas station used by [the informant] to secure the cocaine was circumstantial evidence of a relationship [between the defendant and the informant]." (*Id.* at p. 1070.) The court continued: "Further, the number was circumstantial evidence of the purpose for which the pager was used--to facilitate supplying crack cocaine to [the informant], a drug dealer." (*Ibid.*)

Fields is similar to the instant matter. There, evidence of the telephone number reflected on the pager was admitted as circumstantial proof that the defendant had a preexisting relationship with the informant and the pager was being used to facilitate drug sales. Here, the license plate number on the credit card slip was admitted as circumstantial proof that the car bearing that license plate number was present at the gas station.

However, we question the conclusion reached by the court in *Fields*. In order for the telephone number reflected on the pager to be circumstantial evidence of a preexisting relationship between the defendant and the informant, the pager

would have to reflect accurately the number of the phone booth used by the informant. In other words, the operative fact is not simply what was written on the pager but the truth of what was written on the pager.

But we need not decide that issue here. As we shall explain, the credit card slip information was admissible under the business records exception to the hearsay rule.

Evidence Code section 1271 reads: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Defendant contends the foundational requirements for application of the business records exception were not satisfied in this instance. In particular, defendant argues the business record itself, i.e., the credit card slip, was not produced in evidence. Further, no employee of Texaco testified that he prepared the record in the regular course of business at or near the time of the observation and there was no evidence that the sources of the information and method and time of preparation were such as to indicate trustworthiness.

We are not persuaded. Production of the credit card slip itself was not a prerequisite to admissibility. Evidence Code section 1271 states "[e]vidence of a writing" is not made inadmissible by the hearsay rule if the requirements for a business record are satisfied. "Evidence of" a writing would not appear to be limited to the writing itself but would include any other evidence of the existence or content of the writing. Here, the testimony presented at trial was that in 1971, credit card slips were used by the Texaco station to purchase more gasoline from the distributor. Hence, it was necessary for the station to retain the credit card slip as a form of currency. Instead of taking the slip, the investigating officer wrote down the information from the slip. That officer testified at trial as to what he observed on the credit card slip.

Evidence Code section 1523 generally prohibits the admission of oral testimony to prove the content of a writing. (Evid. Code, § 1523, subd. (a).) However, subdivision (b) of that section reads: "Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence." Here, there is no evidence the investigating officer failed to retain the credit card slip for fraudulent purposes.

While it is true no employee of the Texaco station testified that he prepared the particular credit card slip containing license plate number DUK323 in the regular course of

business, Denny S. testified that he worked at the station in 1971 along with Dave C. According to Denny S., the normal practice for a credit transaction was to take a credit card from the customer, run it through a printer onto a multipage credit card slip, have the customer sign the slip, write down the date and license plate number from the car onto the slip, and initial the slip. On occasion, this last step, putting the attendant's initials on the slip, was not done. The bottom copy of the credit card slip was retained by the station and placed in a cash register. The credit card slips from a given work shift were then bundled together and retained until a shipment of gas arrived, at which time the slips would be turned over to the distributor as payment.

Daniel Patton testified that he was one of the investigating officers in 1971 and went to the Texaco station, where he spoke to Denny S. and Dave C. Patton asked Dave C. for the credit card slips for the night of June 18 through the morning of June 19. According to Patton, his partner, Michael Mergen, copied information from the credit card slips provided by Dave C. Patton testified the credit card slip containing license plate number DUK323 was barely legible except for the license plate number, and they could not make out the name on the credit card or the signature.

Prior testimony of Michael Mergen was also read to the jury. Mergen testified he spoke with Denny S. and Dave C. at the Texaco station and went through the credit card slips from the relevant time period.

The testimony of Denny S. established that credit card slips were prepared and retained by the Texaco station in 1971 in the regular course of business. In addition, the testimony of the investigating officers established that the particular credit card slip containing license plate number DUK323 was one of those credit card slips that had been maintained in the regular course of business. This testimony also established the records were prepared at the time the vehicle receiving gas was at the station. Finally, the sources of the information on the credit card slip and the method and time of preparation were such as to indicate trustworthiness.

A trial court has wide discretion in determining whether a sufficient foundation has been laid to qualify evidence as a business record. On appeal, we will overturn the exercise of that discretion only upon a clear showing of abuse. (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 638-639.) There has been no such showing here.

VI

Preaccusation Delay

The crime in this matter occurred in June 1971. Defendant was not investigated for the crime at that time and eventually the case went cold. The crime lab obtained the victim's clothing for DNA analysis in July 2002, 31 years after the murder. A DNA match was found to defendant. Defendant was charged in October 2003.

Defendant moved to dismiss the charges on the basis of pre-accusation delay. He argued the delay compromised his ability to test physical evidence collected at the crime scene and biological samples taken from the victim for the purpose of proving third-party culpability. Defendant further argued there were missing police reports that tended to prove his innocence, including a report on the investigation of prosecution witness "John Doe" who "now contends that he can identify Defendant from a brief observation thirty-six (36) years ago." Defendant also mentioned reports suggesting license plate number DUK323 had been eliminated as being involved in the case.

In addition, according to defendant, a police report prepared at the time, which was submitted to the court, described another individual as a prime suspect. Defendant explained: "Furthermore, other investigation notes by detectives Enloe (deceased) and Richer (deceased) with the Sacramento Police department, describe interviews with witnesses from Sam's Stage Coach Inn, a restaurant in Cameron Park near where the body was found. Those interviews included Elmo Eck (deceased) Ralph Hoy (deceased) and Jack [W.] (alive but with no recollection of the events described in the report . . .). All witnesses described details about Dale [B.] consistently illuminating [B.] as a suspect. In fact Mr. [B.] was a prime suspect in the murder of Victim. [Citation.] The investigation revealed that Mr. [B.] was frequent [*sic*] customer of Sam's Stagecoach Inn, which is how the witnesses came to know him. All the witnesses mentioned confirmed that Mr. [B.] had claimed

that he had found a new 'love' and wished to leave his wife. When the witnesses were shown a photo of the Victim, all stated that this was the woman that Mr. [B.] identified as the woman he would leave his wife for. Even more striking was the repeated assertion that Mr. [B.] looked 'exactly' like the American River Rapist who was at large at the time Victim was murdered. Lastly, there was no one at the Inn who could establish Mr. [B.]'s whereabouts on the night of the murder."

Defendant further asserted: "The parents of Victim, who passed away after charges had been filed, could have testified that the main reason that Victim fled Oregon was her concern over threats due to her activity as an informant." According to defendant: "The Victim's status as an informant was well documented in the 1971 investigation and was also confirmed in a CLETS report sent to the El Dorado County Sheriff's [D]epartment from Medford, Oregon Police Department in 1971."

Finally, defendant claimed the pre-accusation delay prejudiced him with respect to the Sharon S. and Melinda M. matters due to the loss of evidence and the elimination of evidence corroborating his alibi that he was outside the state at the time of the instant offense. In particular, according to defendant, there are no records corroborating his travel to and stays in New Orleans and Florida.

A criminal defendant's state and federal constitutional speedy trial rights (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1) are not implicated until a defendant has been arrested for or charged with a crime. (See *People v. Martinez*

(2000) 22 Cal.4th 750, 754-755.) Here, defendant was not charged with the murder of Betty C. until 2003, so his constitutional speedy trial rights did not attach until then. Defendant does not claim any unwarranted delay thereafter.

However, preaccusation delay may implicate a defendant's basic right to a fair trial. "'[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' [Citation.] Accordingly, '[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.'" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250.)

But, under both the state and federal Constitutions, there is a threshold showing a defendant must make before the trial court is called upon to balance the prejudice to the defendant against the justification for the delay. Under the federal Constitution, it has been suggested a claim based on preaccusation delay requires that the delay was undertaken to gain a tactical advantage over the defendant. (See *People v.*

Catlin (2001) 26 Cal.4th 81, 107.) However, under the state Constitution, the defendant satisfies the threshold requirement by a showing of either purposeful or negligent delay. (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1255.)

In the present matter, defendant argues there was purposeful delay by the prosecution in order to gain a tactical advantage. Defendant argues bad faith may be established by circumstantial evidence and "[t]he prosecution's failure to show that the delay was caused by a legitimate need to complete an ongoing investigation is circumstantial evidence of bad faith and/or an attempt to obtain a tactical advantage." However, defendant provides no further support for this argument. The record demonstrates, as in *People v. Nelson*, *supra*, 43 Cal.4th 1242, the delay was caused by the absence until 2002 of the ability to do DNA analysis of the crime scene evidence. Until then, the police had insufficient evidence to tie defendant to the crime. It was only after discovery of the DNA match that further investigation revealed other links between defendant and the crime. There is no circumstantial evidence of purposeful delay.

Defendant nevertheless argues that, in 1971, "investigators had information that the license plate of a car associated with [defendant] and his family may have been involved in this case but never contacted anyone to inquire about that vehicle." Defendant also cites a 1998 report in which an investigator identified defendant as a suspect in this case. Although not expressly stated, defendant apparently asserts this evidence

demonstrates negligence on the part of police authorities in 1971.

Defendant mischaracterizes the evidence. In 1971, the police had obtained license plate numbers from vehicles that had visited the Texaco station on the night in question. A further investigation of license plate number DUK323 revealed the registered owners to be Thelma and Richard H. Richard H. was a California Highway Patrol officer. The vehicle in question was a two-door convertible, not a four-door hardtop as described by Karen H.

Defendant presumes from the foregoing that it was negligent for the investigating officers not to question Richard H. about the matter, despite the fact he was a CHP officer and the car did not match the description provided by the eyewitness. However, even if this were true, the officers would have learned only that the car was being driven by defendant at the time. They had nothing else to link defendant to the crime.

But even assuming defendant can satisfy the threshold negligence requirement, most if not all of his prejudice showing is based on his own self-serving statements, an unauthenticated police report, and speculation. By contrast, the prosecution's justification for the delay was the unassailable fact that DNA analysis was not available in this case until 2002. Before that time, there was no evidence known to the police that could have linked defendant to the crime.

In balancing the prejudice to a defendant against the justification for delay, the fact that the prosecution's conduct

was negligent rather than purposeful is a factor to be considered. (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.) "If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*Ibid.*)

"'A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt.'" (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.) "A court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges." (*Ibid.*) A trial court's decision on a motion to dismiss for preaccusation delay will be sustained on review unless it falls outside the bounds of reason. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330.) Here, to the extent the trial court concluded defendant satisfied his threshold requirement, the court's further conclusion the justification for the delay outweighed the prejudice to defendant was not outside the bounds of reason.

Defendant nevertheless contends there was unwarranted preaccusation delay from the time of the DNA analysis in 2002 until charges were filed in 2003. Defendant asserts that, during this delay, "some of the lost evidence might have been preserved or found." However, this argument is based on speculation. Further, defendant identifies no particular evidence that might have been preserved or found. On this

argument, defendant failed in both his threshold showing and his showing of prejudice.

VII

Victim Restitution and Restitution Fines

At sentencing, the trial court ordered direct victim restitution pursuant to Penal Code section 1202.4, subdivision (f), in an amount and manner to be determined by the probation or parole authorities. The court also imposed a restitution fine pursuant to Penal Code section 1202.4, subdivision (b), in the amount of $10,000 and a parole revocation fine pursuant to Penal Code section 1202.45 in the amount of $10,000, with the latter stayed.

Defendant contends the imposition of direct victim restitution violates the ex post facto clauses of the federal and state Constitutions (U.S. Const., art. I, § 9; Cal. Const., art. I, § 10), because the crime predates the victim restitution statute. The ex post facto clauses prohibit the retrospective application of a statute that increases the punishment for a crime that was committed before enactment of the statute. (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

However, in *People v. Kunitz* (2004) 122 Cal.App.4th 652, at page 657, this court concluded direct victim restitution is not punishment within the meaning of the ex post facto clauses. Rather, it is akin to a civil judgment for damages that may be enforced by similar means. (*Ibid.*) Unlike the various types of punishment, the amount of victim restitution is not based on the

nature of the crime or the criminal but on the extent of losses to the victim. Thus, because direct victim restitution is not punishment, it is not subject to ex post facto principles.

However, the restitution fines are a different matter. A restitution fine qualifies as punishment for purposes of the ex post facto clause. (*People v. Kunitz*, *supra*, 122 Cal.App.4th at p. 657.) The People concede error. We accept the People's concession.

DISPOSITION

The Penal Code sections 1202.4, subdivision (b), and 1202.45 restitution fines are stricken. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

SCOTLAND, P. J.

RAYE, J.